IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1967 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SITABEN D/O MADARIBHAI BHAGABHAI DHODIA

Versus

BHANABHAI MADARIBHAI PATEL

Appearance:

1. First Appeal No. 1967 of 1999

MR DR DHIMAR for Petitioner No. 1

..... for Respondent No. 1

CORAM : MR.JUSTICE Y.B.BHATT
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 20/03/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE Y.B.BHATT)

1. This is an appeal by the original plaintiff challenging the dismissal of her suit by the Civil Judge (Senior Division), Surat by judgment and decree in Special Civil Suit No.89/97.

2. It is pertinent to note that the plaintiff is a female and she has filed suit in her capacity as daughter of one Madaribhai Bhagabhai Dhodiya, although it is admitted that she is married. She had sued her brother for partition of ancestral property by metes and bounds, where agricultural lands were the subject matter of this partition suit.

3. The Trial Court after framing appropriate issues on the basis of the pleadings of the parties, considered the entire evidentiary material on record and came to the conclusion that the plaintiff is not entitled to 1/2 share of the suit property as claimed, that the plaintiff failed to prove that the properties which were the subject matter of the suit were joint family properties, that the plaintiff is not entitled to the partition claimed, and that the defendant has proved that the plaintiff has no right title or interest in the suit property.

4. The learned counsel for the appellant has sought to contend before us that the findings recorded by the Trial Court are erroneous in the light of the evidentiary material on record. We have not examined these contentions pertaining to the appreciation of evidence on record in as much as we are of the opinion that the suit suffers from a fundamental defect and that the plaintiff has no right to sue for the reliefs claimed in the suit.

5. It is the plaintiff's own case that she is the daughter and that the defendant is the son of their common father Madaribhai. It is the plaintiff's own case that the agricultural land which are the subject matter of the suit are ancestral property. It is the plaintiff's own case that she is entitled to 1/2 share in the said property. On the basis of these averments and assertion in the plaint, she has sued for partition of the said property by metes and bounds.

6. What requires to be noted is that the plaintiff has not sued merely for a declaration of a share in what is alleged to be ancestral property, and she has not sued for joint possession with the defendant brother in respect of such ancestral property. What she has in fact sued for is for partition of the property by metes and

bounds and possession and delivery of her 1/2 share in the lands in question.

6.1. The fundamental question which arises is as to whether a female who is only a member of a H.U.F., and not a coparcener, can sue for partition by metes and bounds. The answer is clearly in the negative. These are the fundamentals of the Hindu Law and do not require any elaborate discussion. However, reference may be made to Mullas' Principles of Hindu Law (17th Edition), Articles 307, 315, 316, 317 and 333 (3).

6.2. Learned counsel for the appellant has sought to contend that the General Hindu Law stands abolished and or repealed inasmuch as the Parliament has enacted specific Acts dealing with various aspects of Hindu Law. He refers to such Acts as Hindu Marriage Act, 1955, Hindu Minority and Guardianship Act, 1956, Hindu Adoptions and Maintenance Act, 1956 and Hindu Succession Act, 1956. There cannot be any doubt that where the parliament has enacted specific Acts on specific subjects, which formerly formed part of the General Hindu Law, the specific provisions of these specific Acts will override the principles laid down in General Hindu Law to that extent. However, by no stretch of imagination can it be suggested that the General Hindu Law stands abolished as a whole and or repealed only on account of enactment of these specific and particular Acts dealing with only certain aspects of Hindu Law.

6.3. Learned counsel for the appellant sought to rely upon Section 23 of the Hindu Succession Act, 1956, and in this context learned counsel contended that only the right of a female heir to claim partition in respect of dwelling house is postponed until male heirs choose to divide their respective shares therein. On the basis of this submission he contended that these limitations on the right of a female heir pertain only to a dwelling house, and that a restriction of the right to sue for partition cannot apply to properties which are not dwelling houses. In our opinion this contention is misconceived inasmuch as Section 23 of the said Act is a special provision which applies to intestate succession and the rights of male and female heirs of Class-I. The subject of intestate succession has no relation to partition of H.U.F. property and the right to sue for partition. Further more , merely because this specific statutory provision, disentitles a female to sue for partition of the dwelling house does not imply that she has a right to sue for partition in respect of other

properties as well. In fact, taking a composite view of the entire Section as a whole, it is only intended to safeguard the share of the female by conferring upon her the right of residence in the dwelling house which forms part of the H.U.F. property, until a partition is affected by the male heirs. In short the object of the section is to safeguard her interest and also safeguard her share in the property by conferring upon her a right of residence only, until that time when the male coparceners decide to partition the property. This cannot, in any manner, as suggested by learned counsel for the appellant, confer upon the female a right to sue for partition of H.U.F. property, where the same is not a dwelling house.

6.4. Learned counsel for the appellant also sought to rely upon Section 4 of the Hindu Succession Act, 1956, to contend that the General principles of Hindu Law and or any other law applicable to Hindus before the commencement of this Act shall cease to apply to Hindus. However, what the learned counsel for the appellant does not recognise is that the overriding effect of the Hindu Succession Act, 1956 over the General principles of Hindu Law is only in the context of, and to the extent, where the general principles of Hindu Law are inconsistent with any of the provisions contained in this Act. As discussed hereinabove, the controversy in the present matter is as to whether a female member of a H.U.F. has a right to sue for partition by metes and bounds. This subject is not dealt with by the Hindu Succession Act, and, therefore, cannot override the general principles of Hindu Law.

6.5. Learned counsel for the appellant also sought to rely upon Section 6 of the Hindu Succession Act, 1956 to contend that since the plaintiff and the defendant were the children of the same father who held H.U.F. property while he was alive, on the death of the father, the plaintiff (as a daughter) acquired a share in such property in accordance with the provisions of this Act. There cannot be any controversy as to this principle. In fact, she had a share even when her father was alive. It is not the share of the plaintiff in the suit property, which is in controversy (except on the facts of the case). What is presently under discussion is her right to sue for partition by metes and bounds in respect of that share. Only by way of analogy, we may refer to Section 23 of the said Act discussed herein above to indicate that the female having share in the property may not be able to sue for partition but her share in the H.U.F. property is safeguarded until the coparceners

choose to divide their respective shares therein.

6.6. Apart from the general principles of Hindu Law applicable to the share of females in a H.U.F., consideration of Section 23 of the Hindu Succession Act also leads us to infer that, as in the case of dwelling house contemplated by Section 23, other properties in which a female holds a share cannot be partitioned in a suit at her instance, but she would be entitled to a share as and when a partition is effected, at the instance of one of the coparceners.

6.7. Learned counsel for the appellant sought to place reliance upon the decision of the Supreme Court in the case of S. Sai Reddy v. S. Narayana Reddy & Anrs. reported in 1991 (3) S.C.C. 647.

6.8. It must first be noted that this is a decision on the interpretation of Section 29-A (iv) and (ii), as introduced by Hindu Succession (A.P. Amendment) Act, 1986. The ratio laid down in the Supreme Court is to the effect that a daughter having share in coparcenary property can claim a share under the provisions of the Act as amended by the State of Andra Pradesh, where the final decree in respect of the partition had been passed after the amendment came into force. It also requires to be noted that the aforesaid decision is in the context of two significant factors, namely, the effect of the amendment upon the right of a daughter, and whether the daughter would be entitled to a share in the coparcenary property under clause - II of the Section 29-A of the Act. What is significant and which must be noted is that, in the present case, and in the present discussion, we are not considering whether the plaintiff had a share in the H.U.F. or not. Only for the sake of assumption, we may assume that she had such share (although the Trial Court on facts and evidence on record found that she did not have a share). As aforesaid, assuming that she had a share, the present discussion is as regards whether she had right to sue for partition of such share. A female's right to sue for partition is not in any manner contemplated by the said decision relied upon by the learned counsel for the appellant.

7. It is also pertinent to note that plaintiff has not filed the suit as heir of her father Madaribhai, so as to claim a share in the interest of Madaribhai in his H.U.F. What the plaintiff has sued for is not her father's share in the H.U.F., but she has sued for the partition of the entire H.U.F. properties held by Madaribhai as karta of the H.U.F. Obviously, on these

facts and under such circumstances, Section 6 of the Hindu Succession Act would not be applicable, which deals only with the devolution of the interest of a coparcenary in H.U.F. property under intestate succession.

8. Even otherwise, it is the plaintiff's own case that she was married 26 years prior to the suit. It is well settled that, on the marriage of a female, she ceases to be a member of her fathers' H.U.F., and becomes a member in her husbands' H.U.F. Obviously therefore, the plaintiff had no interest or share in the property of her fathers' H.U.F. on the date of the suit.

In the premises aforesaid we find there is no substance in the present appeal and the same is therefore summarily dismissed.

(Y.B. BHATT, J.)

(SHARAD D. DAVE, J.)

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